

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
UNITED STATES OF AMERICA,

S1 12 Cr. 153 (RJS)

-against-

MEMORANDUM OF LAW

XING WU PAN,
a/k/a "OLIVER PAN,"
and

JIA HOU,
a/k/a "JENNY HOU,"
Defendants.

-----X

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT OLIVER PAN'S
MOTION TO DISMISS THE SUPERSEDING INDICTMENT**

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September 10, 2012

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INTRODUCTION

The Superseding Indictment against Oliver Pan (“Mr. Pan”) should be dismissed because the Government violated the Fifth Amendment’s guarantee of due process by the demonstrably outrageous and conscience shocking manner in which the government conducted every aspect of this case against Mr. Pan. (Exhibit A, Superseding Indictment of Oliver Pan). This governmental misconduct began with the initial wiretap investigation into New York City Comptroller John Liu’s (sometimes referred to herein as “Mr. Liu”) campaign fund raising and continued during the Government’s subsequent initiation and execution of the undercover sting operation against Mr. Liu and Mr. Pan.

Beginning in 2009 the Government conducted an investigation into the fund raising practices of Mr. Liu. Although the investigation included surveillance and extensive wiretapping, it failed to produce evidence of criminal conduct by Mr. Pan or Mr. Liu. In early 2011, the Government began an undercover sting operation. The primary target was Comptroller Liu but the operation also was directed at the defendant Oliver Pan. Mr. Pan was an occasional minor fundraiser and supporter of Mr. Liu. The purpose of the undercover operation was to manufacture a crime involving campaign finance laws by the Comptroller and Mr. Pan. Mr. Pan was entrapped by the undercover sting into violating the campaign finance law, but Mr. Liu was not ensnared by the operation. Still intent on making a criminal case against Mr. Liu, the Government used the promise not to arrest Mr. Pan to coerce him to help the Government continue its attempt to manufacture a crime by Mr. Liu. When that attempt also failed, despite Mr. Pan’s coerced cooperation, the Government broke its promise and arrested Mr. Pan.

The Government’s misconduct was driven by what can only be described as its obsession with prosecuting Comptroller Liu. Whatever the reasons for the Government’s misconduct, we

submit that the factual allegations set forth below constitute “government action... [so] fundamentally unfair or shocking to our traditional sense of justice or conduct so outrageous that common notions of fairness and decency would be offended were judicial processes invoked to obtain a conviction against” Mr. Pan. *United States v. Schmidt*, 105 F.3d 82, 91 (2d Cir. 1997), *cert. denied*, 522 U.S. 846, 118 S. Ct. 130, 139 L. Ed. 2d 80 (1997). These factual allegations, if disputed by the Government, entitle Mr. Pan to a pre-trial hearing to offer proof of these allegations, and if not disputed, or if proven, to a dismissal of the indictment against him.

[A] claim that the government has acted outrageously is taken seriously because ensuring that the government does not trample in an unconscionable manner on individual dignity is a bed-rock duty of judicial officers. Sometimes the government’s involvement in manufacturing crime is demonstrably outrageous, and in those cases, the convictions of targeted defendants have been set aside.” *Id.*

STATEMENT OF FACTS

1. The Government’s conduct of the wiretap investigation into Comptroller Liu’s campaign fund raising which preceded the undercover sting operation

In *ex parte* applications to a succession of judges made between March 1, 2010 and September 23, 2011 to obtain and to continue judicial approval of the wiretap orders which targeted, among others, John Liu, Mei Hua Ru (“Ms. Ru”) and Mr. Pan, the Government misled these judges either intentionally or with a reckless disregard for the truth by affirmatively misrepresenting by deceitful omission conduct and conversations between various of the targeted persons as evidence of criminal activity.

A glaring example of such a misrepresentation can be found in three separate almost identical submissions to the Court: (1) excerpts of a ten day Periodic Report submitted on July 20, 2010 pursuant to the July 8, 2010 wire tap order for a phone belonging to Ms. Ru, (*See* Exhibit B, excerpts of a Periodic Report dated July 20, 2010 submitted pursuant to a July 8, 2010

Order authorizing the interception of wire and electronic communication over a cellular telephone); (2) excerpts of an Affidavit of a Special Agent of the Federal Bureau of Investigation in Support of an Application for Authorization to Intercept Wire and Electronic Communications dated July 20, 2010, (*See* Exhibit C); and, (3) excerpts of an Affidavit of a Special Agent of the Federal Bureau of Investigation in Support of an Application for Authorization to Intercept Wire and Electronic Communications dated August 13, 2010. (*See* Exhibit D). At those times, Ms. Ru was treasurer of the Liu Campaign. In these submissions to the Court, the Government recounted in identical terms a conversation between Ms. Ru and Mr. Liu on July 9, 2010. (*See* Exhibits B-D). The Government stated:

Based upon the agents' training, experience, and familiarity with the investigation, it is believed that RU and LIU are discussing campaign contributions for the Liu Campaign that RU had collected. It is further believed that RU and LIU were discussing an illegal campaign contribution from a "Victor Chung" in the amount of \$10,000. This is based on agents having conducted a review of the Campaign Finance Board rules and regulations governing New York City campaigns for both Comptroller and Mayor and determining that an individual can only donate \$4950 for the general election and only \$2475 for a runoff election. In his campaign for New York City Comptroller, LIU was involved in a runoff election. Accordingly, a \$10,000 donation from "Victor Chung" would contravene applicable campaign finance rules. Moreover, no individual with the name "Victor Chung" is listed as an "intermediary" or "bundler" with the Liu campaign. (emphasis supplied) (*See* Exhibits A-C).

Taken alone, without reference to a previous day's unreported conversation, the Government's descriptions of this reported conversation seemed accurate. However, an unreported conversation between Ms. Ru and Mr. Liu which took place one day before this reported conversation makes clear that what the Government described as an individual contribution of \$10,000.00 by Victor Chung was in fact the contributions of six donors, none of which exceeded the general election campaign limit of \$4950.00 and none of which were in violation of

campaign finance laws. (*See* Exhibit C, a Compact Disc containing an audio recording of a telephone conversation between Ms. Ru and Mr. Liu dated July 8, 2010).

During this unreported July 8, 2010 conversation recorded pursuant to the same wiretap order, Ms. Ru and Mr. Liu reviewed and discussed, among other things, campaign contributions that had been collected by “Victor Chung”. (Exhibit C). Mr. Liu and Ms. Ru extensively discussed “a \$10,000 batch” of contributions that Mr. Chung had collected from various individuals. (*Id.*). The recorded conversation consisted of a detailed description of \$10,000 in six separate donations. (*Id.*). During the conversation, Ms. Ru informs Mr. Liu that Mr. Chung collected the \$10,000 from the six separate donors, who she identifies using the names of each, in the following amounts:

1. \$2000;
2. \$2500;
3. \$1950;
4. \$1950;
5. \$800;
6. \$800.

(*Id.*).

Ms. Ru and Mr. Liu also discussed the fact that the donations were to be deposited in the general election account and that they would verify that such donors had not contributed to the run-off campaign as well. (*Id.*). This unreported conversation clearly demonstrated that Mr. Liu and Ms. Ru were actively verifying that the six contributions received from Victor Chung were in compliance with applicable campaign finance laws and that they were discussing individual contribution amounts well within general election campaign finance law limits. (*Id.*). The Government completely omitted to mention this entire conversation in these three submissions to the Court. (*See* Exhibits B-D).

An equally glaring example of the Government's acting intentionally or with reckless disregard for the truth and thus misleading the Court is the Government's false descriptions and deceptive omissions of fact contained in a September 23, 2011 Affidavit submitted by the Government in support of an application for a wiretap order. (*See* Exhibit F, excerpts of an Affidavit of a Special Agent of the Federal Bureau of Investigation in Support of an Application for Authorization to Intercept Wire and Electronic Communications dated September 23, 2011).

Under the heading "Introduction of the UC[Undercover Agent] to TARGET SUBJECT XING WU PAN, a/k/a/ "Oliver Pan", the Government purports to describe to the Court what occurred between Mr. Pan and the UC during the four months between their first meeting on March 24, 2011 and July 27, 2011. (*See* Exhibit F). The Government's description of Mr. Pan's conduct during this period is grossly inaccurate. The Government completely failed to inform the court that during this period Mr. Pan repeatedly and unequivocally rejected the UC's attempts to induce him to violate campaign finance laws. (*See* Affidavit of Oliver Pan dated September 7, 2012 ("Pan Aff.") at ¶¶ 13, 15). The Government's description makes it appear that during this period Mr. Pan was receptive to the UC's inducements and was ready, willing and eager to arrange large illegal contributions to Mr. Liu's campaign beginning shortly after the UC's first contact with him. (*See* Exhibit F ¶ 33).

As to that first contact on March 24th at a luncheon attended by many Chinese- American business men and women, the Government's Affidavit of September 23, 2011, states only "the UC met TARGET SUBJECT XING WU PAN a/k/a "Oliver Pan" who provided the UC with the phone number for the target cell phone". (*See* Exhibit F ¶ 33). The Government completely fails to mention, as the video recording of March 24, 2011 clearly demonstrates, that Mr. Pan repeatedly and unequivocally told the UC that the maximum amount the UC could contribute to

Mr. Liu's campaign was \$800, the Liu campaign's self-imposed contribution limit. (Pan Aff. ¶ 11). The Government goes on to state:

After this event [the March 24th luncheon], the UC and PAN had multiple conversations concerning the UC making a large campaign donation to the Liu campaign that would exceed the allowable maximum contribution for the 2013 New York City election. During these conversations with the UC, both over the TARGET CELLPHONE and in person, PAN discussed facilitating this donation by using "straw donors" to donate money to the Liu Campaign in their own names and then reimbursing these "straw donors" with the cash from the UC. These conversations—between PAN, the UC and other TARGET SUBJECTS—that occurred over the TARGET CELLPHONE and in person are as follows:

a. On June 14, 2011, TARGET SUBJECT XING WU PA, a/k/a "Oliver Pan," introduced the UC to TARGET SUBJECT MEI- HUA RU at a location in New York, New York. During this meeting, which was recorded with the use of an undercover video camera, RU spoke with PAN and UC about the Liu Campaign's fundraising goals for the 2013 New York City election cycle, and TARGET SUBJECT JOHN LIU'S plans to run for office of mayor of New York City. (*sic*) (See Exhibit F ¶ 33-33(a.)); (Cf. Exhibit G, excerpts of a Video Recording of June 14, 2011 meeting of Mei Hua Ru, the UC and Oliver Pan).

The Government failed to inform the Court that Mr. Pan and the UC had numerous other meetings, telephone conversations and text message exchanges, in addition to the June 14th meeting, between March 24th and July 27, 2011. (Pan Aff. ¶¶ 12, 15-16, 20). When at the July 27th meeting Mr. Pan first agreed to use "nominees" (not "straw donors"), Mr. Pan did so at the UC's suggestion. (Pan Aff. ¶ 24). The Government's statement to the Court that "[d]uring these conversations" between Pan and the UC the use of straw donors ["nominees"] was "discussed", implies that such discussions took place beginning shortly after March 24, 2011. (Exhibit F ¶ 33). In fact, the July 27th meeting was the first contact between Mr. Pan and the UC at which the use of "nominees" ("straw donors") was mentioned. (Pan Aff. ¶ 24).

It was grossly inaccurate for the Government to state that these prior to July 27th conversations were conversations "concerning the UC making a large [illegal] campaign donation to the Liu campaign" clearly implying that Mr. Pan was in agreement. (Exhibit F ¶ 33).

The UC did repeatedly raise the subject of making such large campaign donations with Mr. Pan during these conversations. (Pan Aff. ¶¶ 13, 15). However, every time the UC raised the subject, Mr. Pan clearly, unequivocally and repeatedly told the UC that the maximum the UC could contribute to Mr. Liu's campaign was \$800. (*Id.* at ¶¶ 11, 13, 15) When the UC offered to make a contribution to the Liu campaign at dinner with Mr. Pan on April 20, 2011, Mr. Pan insisted that the contribution be in the amount of \$800. (*Id.* ¶ 13). In fact, the UC's April 27, 2011 contribution was in the amount of \$800. (*Id.* ¶¶ 13-14).

The Government only describes one conversation that took place between March 24, 2011 and July 27, 2011. (Exhibit F ¶ 33-33(a.)). That was a June 14, 2011 meeting among Mr. Pan, Ms. Ru and the UC. (*Id.*). The Government states that Mr. Pan "introduced" the UC to Ms. Ru at the meeting. (*Id.*). The Government fails to mention that the meeting only came about as a result of the UC's constantly pressuring Mr. Pan to arrange it, not because Mr. Pan wanted the UC to meet Ms. Ru. (Pan Aff. ¶¶ 16, 17, 20).

The Government's Affidavit of September 23, 2011, asserts that the June 14, 2011 meeting was one at which "a conversation concerning the UC making a large [illegal] campaign donation to the Liu campaign" and a discussion of the use of "straw donors" to facilitate it occurred. (Exhibit F ¶ 33-33(a.)). However, the Government's own description of the conversation merely states that the conversation at the June 14th meeting concerned "the Liu Campaign's fundraising goals for the 2013 New York City election cycle..." and "LIU's plans to run for office of mayor(sic) of New York City"(sic). (*See id.*). Thus, although the Government makes it appear that Mr. Pan and the UC began having conversations concerning illegal donations almost immediately after their first meeting on March 24, 2011, the fact is that no such conversations occurred until July 27, 2011, four months later. (Pan Aff. ¶¶ 19, 24).

2. The Government's conduct in the initiation and execution of the undercover sting operation against Oliver Pan.

a. The initiation of the operation.

By the end of 2010, the Government's investigation had not produced evidence of criminality on the part of Mr. Liu, his staff or Mr. Pan. Mr. Pan was not a close aide or close advisor or even part of the Liu Campaign; he was a minor occasional fundraiser. (*Id.* at ¶ 10) Nevertheless, the Government initiated and executed an undercover operation against Mr. Liu and Mr. Pan in violation of its own internal guidelines governing the conduct of such operations. (See Exhibit H, Attorney General's Guidelines on FBI Undercover Operations § V (May 30, 2002) (sometimes referred to herein as "the Guidelines"). The Government did this solely for the purpose of manufacturing a crime which would not have occurred but for the Government's extensive involvement in instigating its commission and instructing Mr. Pan in how to commit it. The Government's purpose was not to prosecute Mr. Pan alone. What it really wanted was to use the threat of arrest to coerce Mr. Pan into helping the Government manufacture a criminal case against Mr. Liu if the undercover operation did not implicate Mr. Liu. This is abundantly clear from the Government's own conduct in this case.

The Guidelines contain a section entitled "Protecting Innocent Parties Against Entrapment" and provide that "Entrapment must be scrupulously avoided." (Exhibit H). The Guidelines go on to state that:

[N]o undercover activity involving an inducement to an individual to engage in a crime shall be authorized unless an approving official is satisfied that... one of the two following limitations is met:

- (i) There is reasonable indication that the subject is engaging, has engaged, or is likely to engage in the illegal activity proposed or in similar illegal conduct; or

- (ii) The opportunity for illegal activity has been structured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal conduct.”

(*Id.*).

As to (i), there was no independent evidence and the wiretaps had produced no evidence which could have provided “a reasonable indication” that Mr. Pan “was engaging, [had] engaged, or [was] likely to engage in” any illegal activity.

b. The Execution of the Undercover Operation.

As to (ii), the undercover operation was structured and carried out in a manner that created every reason to believe and in fact did result in persons “drawn to the opportunity, or brought to it”, not being limited to “persons predisposed to engage in the contemplated conduct,” namely Mr. Pan. (*Id.*).

The extensive discovery provided by the Government does not reveal whether this undercover sting operation was accurately described to and approved by an FBI official, as required by the Guidelines, and, if so, what facts were presented to that official that demonstrated compliance with sections (i) and (ii).¹

At Mr. Pan’s insistence, the UC’s first contribution of April 27, 2011 to the Liu campaign was limited to \$800 (Pan Aff. ¶¶ 13-14). Despite this clear evidence that Mr. Pan was not predisposed to violate campaign finance laws and had no interest in doing so, the Government persisted in its attempt to induce him, but in a different way. Between April 27, 2011 and June 14, 2011, in addition to the UC continuing his intensive campaign to become Mr. Pan’s friend and treating him to expensive meals, the UC began to put pressure on Mr. Pan to obtain a meeting for the UC with either or both Mr. Liu and Ms. Ru. (*Id.* at ¶¶ 15-16). Ms. Ru agreed to a brief meeting to be held on June 14, 2011. (*Id.* at ¶ 18). Whatever the Government hoped

¹ These are precisely the types of questions of fact which a hearing on this matter would resolve.

would occur at this meeting, it did not happen. It merely resulted in Ms. Ru delivering a lecture to the UC on why the Liu campaign's \$800 contribution limit was an effective fundraising strategy. (*Id.*); (Exhibit G).

The Government now had to know from their conduct and their complete lack of response to the Government's attempts at inducement, that both Mr. Pan and Ms. Ru were not predisposed to violate campaign finance laws. (*See generally* Pan Aff. *and* Exhibit G). Nevertheless, fueled by its obsession and disregarding the indisputable facts, the Government persisted in its attempt to manufacture a crime. After June 14, 2011, the UC continued his "courtship" of Mr. Pan, making him believe that the UC was his "very good friend". (Pan Aff. ¶ 20). Despite Ms. Ru's unequivocal lack of interest in illegal contributions at the June 14th meeting, (*See* Exhibit G), the UC continued to exert pressure on Mr. Pan to arrange another meeting with Ms. Ru or a meeting with Mr. Liu. (Pan Aff. ¶ 20).

Ms. Ru did not respond to either Mr. Pan's or the UC's attempts to contact her. (*Id.* at ¶ 21). Instead, Ms. Ru instructed Crystal Feng ("Ms. Feng"), a Liu campaign volunteer, to return Mr. Pan's calls. (*Id.*). Ms. Feng called Mr. Pan on/or about July 25th or 26th. (*Id.* at ¶ 22). She responded to Mr. Pan's request for a meeting between his friend (the UC) and the Comptroller. (*Id.*). She told Mr. Pan that Mr. Liu would only meet with his friend at a fundraiser arranged by the friend at which a minimum of ten people attended and contributed \$800 each. (*Id.*). She added that it would be even better if twenty (20) people attended the event and contributed \$800 each. (*Id.*).

On July 27, 2011, Mr. Pan told the UC what Ms. Feng had told him was necessary in order to secure a meeting between the UC and Mr. Liu. (*Id.* at ¶ 23); (*See also* Exhibit I, excerpts of a Video Recording of July 27, 2011 meeting between the UC and Mr. Pan). The UC

seized upon this new opportunity to induce Mr. Pan to violate the law. The UC knew from Mr. Pan's repeated rejections of his previous attempts at inducing him that merely offering Mr. Pan the opportunity to violate the law would not be likely to lead to the result he wanted. Instead, the UC actually suggested to Mr. Pan how to obtain the UC's goal of getting such a meeting without using real donors. (Pan Aff. ¶ 24); (*See* Exhibit I). He told Mr. Pan that "nominees" could be used instead of real donors. (*Id.*). The UC said:

You could go to a thousand people for eight hundred or you could go to ten people to collect the same amount....

Why make it hard?... \$800.00, right... I still say... find... five, six... big donors, and keep 'em happy!" The UC then told Mr. Pan "I am sure it won't... it won't be the first time, or the last time being used... of ah... using the nominees (chuckles), or things... I am sure there are people who donate more... than the... donate ten, twenty thousand dollars, ah... there is ways (sic) around it. You can [use] nominee names and everything.... (emphasis supplied). (Exhibit I); (Pan Aff. ¶ 24).

The UC even told Mr. Pan he could take names out of the phone book. (*Id.*).

By July 27th the UC's four month campaign to ingratiate himself with Mr. Pan and become his good friend had succeeded. Mr. Pan wanted to help the UC get the meeting he wanted. (Pan Aff. ¶ 24). Between July 27th and August 17th, the date of the fundraiser at which the nominees were used, there were numerous contacts between Mr. Pan and the UC. (*Id.* at ¶ 25, 26). In those conversations the UC made clear how much he wanted the meeting and that he wanted it as early as August 16th or 17th. (*Id.*). Mr. Pan finally agreed to do something wrong, to use nominees as suggested by the UC. (*Id.* at ¶ 27).

In an August 15th conversation Mr. Pan expressed his reservations about his and the UC's plan to use nominees. (*Id.* at ¶ 26); (*See also*, Exhibit J, Audio Recording of August 15, 2011 telephone conversation of the UC and Mr. Pan). He told the UC that he was uncomfortable with what they were doing, that he wasn't sure they should go through with it, and he asked the UC

“are you sure you wanna do this.” (Pan Aff. ¶ 26); (Exhibit J). Additional evidence of Mr. Pan’s hesitation and lack of predisposition is the fact that Mr. Pan waited to arrange the actual use of any of the nominees until August 16, 2011, the day before the fundraiser because he had reservations about what they were doing and he hoped the UC would change his mind about doing it. (Pan Aff. ¶ 27). Ignoring Mr. Pan’s reservations, the UC persisted in urging Mr. Pan to go forward with the plan to use nominees. (*Id.*); (Exhibit J).

It was the Government’s hope that the August 17th event would provide evidence of a conspiracy to violate campaign finance laws between the Liu campaign and Mr. Pan, its real goal. In fact, the August 17th event did not achieve this goal. Therefore, rather than arresting Mr. Pan, the Government continued its undercover operation between August 17th and October 20, 2011. (Pan Aff. at ¶ 28). However, its continued attempt to induce Oliver Pan to implicate anyone in the Liu campaign in any new violations of campaign finance laws or in what had occurred on August 17th, were unsuccessful. (*Id.* at ¶ 28). Now realizing that the undercover operation was not likely to achieve its real goal, the Government once again changed its tactics.

3. Beginning on October 20, 2011 and up to his arrest on November 15, 2011, the Government coerced Mr. Pan into trying to help the Government to manufacture a criminal case against John Liu.

In the late afternoon of Thursday, October 20, 2011, three FBI agents appeared at Mr. Pan’s office. (*Id.* at ¶ 29). One agent took up a position outside of the office preventing anyone from entering or leaving. (*Id.*). The other two agents remained in the office and began questioning Mr. Pan. (*Id.*). These agents remained in his office for approximately five hours. (*Id.*).

The agents told Mr. Pan that they knew what he had done at the August 17th fundraiser. (*Id.* at ¶ 30). They told him they knew many things about his life—where he and his wife lived,

where his two children went to school and who his friends were. (*Id.*). They told him that they could arrest him for what he had done. (*Id.*). They described the shame on his family and the public humiliation such an arrest would bring and how it would ruin the wonderful reputation in the Chinese community he was so proud of and had worked so hard to build over so many years. (*Id.*).

Mr. Pan reasonably understood as threatening, however vague, the agents' revealing their detailed knowledge about his wife and children and their whereabouts. (*Id.* at ¶¶ 30, 31). This terrified Mr. Pan. (*Id.* at 31). This implied threat particularity resonated with Mr. Pan who, now an American citizen, had spent the first sixteen years of his life under the totalitarian government of the People's Republic of China. (*Id.*). Mr. Pan also was frightened and intimidated by the agents' threat of arrest. (*Id.*). The agents then told him how he could avoid this parade of horrors. They promised that they would not arrest him if he agreed to cooperate with the Government in manufacturing a criminal case against Mr. Liu and/or his staff. (*Id.*). They told him this cooperation would consist of telling the truth and doing whatever they demanded of him, which would include authorizing them to listen in on his telephone conversations with Mr. Liu and his staff and wearing a recording device when he met with them. (*Id.*). They told him he had to sign a form consenting to the Government listening to his telephone calls. (*Id.*). Mr. Pan repeatedly asked to consult with a lawyer. (*Id.*). He was told if he did so there would be no deal. (*Id.*). Mr. Pan signed the form and agreed to cooperate. (*Id.*).

As early as the October 20th meeting, the FBI agents knew that Mr. Pan's cooperation would not consist of providing information of illegal conduct by Mr. Liu and or his staff. This was because Mr. Pan repeatedly told the agents, beginning at this first meeting, that he could not truthfully say that anyone in the Liu campaign knew that the donors at the August 17th fundraiser

were reimbursed nominees because he had tried to conceal that from them. (*Id.* at ¶ 32). Thus, the cooperation the agents sought was to use Mr. Pan to help manufacture a new crime by Mr. Liu or his staff, not simply to provide the Government with information.

From his office that same evening, at the agents' direction, Mr. Pan telephoned Ms. Ru. (*Id.* at ¶ 33); (*See* also, Exhibit K, Audio Recording of October 20, 2011 telephone conversation of Mr. Pan and Ms. Ru). Following the agents instructions he spoke at length with Ms. Ru about a newspaper article reporting possible Liu campaign fundraising irregularities. (Pan Aff. ¶ 33); (Exhibit K). The conversation produced no evidence of criminal activity. (Exhibit K). There were telephone calls and text messages between Mr. Pan and the agents over the weekend. (Pan Aff. ¶ 34). Mr. Pan met with the agents on Monday October 24, 2011 at the FBI offices.² (*Id.*). During the next few weeks, the Government became dissatisfied with the lack of results from Mr. Pan's cooperation. After it became clear to the FBI agents that Mr. Pan was not going to be able to help them implicate Mr. Liu or anyone in his campaign, the Government, despite the fact that Mr. Pan had been truthful and had done everything asked of him, broke its promise and arrested him on November 15, 2011. (*Id.*).

² Interestingly, these meetings between October 20th and up to and including October 24th and any subsequent meetings between the agents and Mr. Pan, unlike every other government contact with Mr. Pan, were not recorded. Additionally, although the Government provided FBI FD-302 Reports ("302s") describing interviews with Mr. Pan for most of the period between October 20, 2011 and November 15, 2011, one of those 302s describing an October 28, 2011 meeting was not prepared until August 2012.

SUMMARY OF LAW

1. Dismissal of an Indictment on Due Process Grounds

The Supreme Court has recognized the possibility of the dismissal of an indictment on due process grounds. *United States v. Russell*, 411 U.S. 423, 431-432, 93 S. Ct. 1637, 1643, 36 L. Ed. 2d 366, 373 (1973) (“we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction”).

The Second Circuit has repeatedly recognized that outrageous government conduct, or conduct which “shocks the conscience,” would warrant dismissal of an indictment for violation of the Fifth Amendment’s due process guarantee.³ *United States v. Rahman*, 189 F.3d 88, 131 (2d Cir.), *cert. denied*, 528 U.S. 982, 120 S. Ct. 439, 145 L. Ed. 2d 344 (1999); *United States v. Nunez-Rios*, 622 F.2d 1093, 1098 (2d Cir. 1980); *Schmidt*, 105 F.3d at 91. The burden on the defendant to prove that the Government’s conduct shocks the conscience is high. *United States v. Rahman*, 189 F.3d 88, 131 (2d Cir. 1999).

While no District Court within this Circuit has yet held any government conduct so shocking as to constitute a violation of a defendant’s due process, *United States v. Cromitie*, 781 F.Supp.2d 211, 214 (S.D.N.Y. 2011), other courts have found that the Government engaged in outrageous conduct and have dismissed indictments based on a due process violation. *See, e.g.*,

³ Outrageous government conduct is different from entrapment. “Unlike the entrapment defense, which focuses on the defendant’s predisposition, this due process claim focuses on the conduct of the government agents.” *United States v. Myers*, 692 F.2d 823, 836 (2d Cir. 1982), *cert. denied*, 461 U.S. 961, 103 S. Ct. 2437, 77 L. Ed. 2d 1322 (1983). Thus, “[a]n indictment may be set aside because of outrageous government conduct whether or not the defendant was predisposed to engage in criminal activity.” *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991).

United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991). The common thread uniting these cases is that the Government's extensive involvement "created" or "manufactured" the crime with which the defendant was charged. *See Twigg*, 588 F.2d at 381 (dismissing indictment where "government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs"); *United States v. Lard*, 734 F.2d 1290, 1297 (8th Cir. 1984) (dismissing indictment where government's conduct was "aimed at creating new crimes for the sake of bringing criminal charges against Lard, who, before being induced, was lawfully and peacefully minding his own affairs"); *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) (dismissing indictment where "the Government's conduct rises to a level of 'creative activity'"); *United States v. Gardner*, 658 F. Supp. 1573, 1576 (W.D. Pa. 1987) (dismissing indictment where Government informant "created [a] crime rather than uncovered crime" and the defendant "lack[ed] prior criminal involvement"); *United States v. Batres-Santolino*, 521 F. Supp. 744, 751 (N.D. Cal. 1981) (dismissing indictment where "government agents 'manufactured' a crime"). Notably, the Second Circuit has also recognized that the Government's involvement in manufacturing a crime may be sufficient to constitute outrageous government conduct. *Schmidt*, 105 F.3d at 91.

2. Necessity for a Pre-Trial Hearing to Determine Disputed Factual Issues

While it is true that "[w]ithout disputed facts, no hearing [is] necessary," *United States v. LaPorta*, 46 F.3d 152, 160 (2d Cir. 1994), the Second Circuit has recognized that "[m]ost often, conducting a hearing [on the issue of outrageous government conduct] is the preferred course of action in cases where disputed factual issues exist." *United States v. Cuervelo*, 949 F.2d 559, 567 (2d Cir. 1991). Since allegations of government misconduct are taken seriously by the Court, a

hearing is preferred because it allows the Court to closely examine the Government's activities. "It cannot be gainsaid that myriad facts and circumstances can arise in the complex context of what is commonly frequent and close interaction among government agents, witnesses and prospective defendants." *Cuervelo*, 949 F.2d at 567. "A hearing allows for a searching inquiry into the particulars of the investigative process employed by the government, as the court undertakes to sort through the various conflicting claims, and permits factual determinations to be made by the district judge. A hearing also provides the district judge with an opportunity to observe the demeanor and assess the credibility of various witnesses." *Id.* Following *Cuervelo*, District Courts have recognized the benefit of conducting a hearing for determining disputed issues of fact. *See, e.g., United States v. Koschtschuk*, 2011 U.S. Dist. LEXIS 24564, *14, 2011 WL 867469, *4 (W.D.N.Y. 2011) (granting a hearing on issue of government's outrageous conduct).

Accordingly, where disputed issues of fact exist regarding the propriety of the Government's actions, the Court should conduct a hearing to determine whether the Government's conduct rose to the level of conscience-shocking activity and a due process violation.

ARGUMENT

POINT I

THE FACTS ALLEGED CONSTITUTE OUTRAGEOUS AND CONSCIENCE SHOCKING CONDUCT SUFFICIENT TO REQUIRE A DISMISSAL OF THE SUPERCEDING INDICTMENT AGAINST MR. PAN.

Some of the Government's conduct in this case by itself may constitute constitutionally outrageous misconduct, but in any event the unique and egregious combination of that conduct clearly crosses that undesirable threshold.

1. The Government's misstatements to the Court in *ex parte* submissions to obtain and continue the wiretap orders.

The seriousness of intentionally or with reckless disregard of the truth misleading a court in *ex parte* submissions to obtain court permission to conduct one of the most intrusive of investigative techniques is difficult to overstate. Short of physical abuse of a defendant, it is difficult to envision conduct more outrageous or shocking to the conscience.

2. The Government acted in total disregard of its own internal guidelines as to against whom undercover sting operations should be initiated.

The Government had no evidence at the time it began the sting to bring the operation within its own Guidelines. As the Government states in the Guidelines section entitled

"Exception" (an exception to the "AUTHORIZATION REQUIREMENTS" of the Guidelines):

The alternative requirements of paragraph B(4) [which consists of the two limitations as to when the Government may engage in undercover activity "involving an inducement...to engage in a crime", as set forth on page 8 above], while not required by law, are imposed to ensure the Government does not offer inducements to crime to persons who are not predisposed to do so. These standards can be waived only by the Director upon a written finding that the activities are necessary to protect life or prevent other serious harm.

(Exhibit H).

The Government's utter failure to act in accordance with its own Guidelines in exercising its enormous investigative powers is conduct that should be considered constitutionally outrageous, alone or in conjunction with other misconduct. The almost unlimited scope of the Government's investigatory powers, given the reluctance of courts to interfere with Government investigative techniques, and an adherence to the law governing entrapment, should create a corresponding equivalent obligation on the part of the Government to exercise that power with fairness and enormous restraint in order to avoid making criminals of unwary innocents. *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933) (Hand, J.) ("[t]he whole [entrapment] doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist").

3. The Government continued the sting operation against Mr. Pan despite having conclusively learned from his repeated and unequivocal rejection of the UC's inducements that he was not predisposed to violate campaign finance laws. The Government did this solely to manufacture a criminal case against Comptroller Liu.

In executing the sting operation, the Government learned repeatedly and conclusively that Mr. Pan was not predisposed, not interested, ready or eager to arrange campaign contributions in excess not only of the legal limit, \$4,950, but of the Liu campaign's self-imposed limit of \$800. Nevertheless, the Government persisted in inducing him to violate the law. The Government had no evidence before it began its attempt to induce violations of campaign finance laws by Mr. Pan that he was engaging in any such conduct. Moreover, it conclusively knew from the conduct of its own operation that Mr. Pan was not so predisposed. The respect for and adherence to fundamental fairness which is the essence of due process, *Hampton v. United States*, 425 U.S. 484, 495 n. 6, 96 S. Ct. 1646, 1653 n. 6, 48 L. Ed. 2d 113, 122 n. 6 (1976) (Powell, concurring), should have caused the Government to cease its attempts to induce Mr. Pan to violate the law

either after Mr. Pan arranged the April 27, 2011 \$800 contribution or after the June 14, 2011 meeting of Mr. Pan, the UC and Ms. Ru. The Government's continued attempts to induce criminal conduct by Mr. Pan even after these clear and repeated demonstrations of his complete lack of predisposition not only constituted entrapment as a matter of law but was in and of itself outrageous and conscience shocking.

The Government's reason for persisting was not a sincere but mistaken belief that Mr. Pan was a clever criminal who did not want to be caught. The Government persisted in inducing someone it knew beyond any doubt was not predisposed to violate campaign finance laws only because it wanted to use the threat of arrest or criminal prosecution to coerce Mr. Pan to help the Government manufacture a criminal case against John Liu. It is respectfully submitted that this extraordinary involvement by the Government in the manufacture and attempted manufacture of these crimes is so outrageous and conscience shocking that it alone requires dismissal of the indictment against Mr. Pan.

4. The Government terrorized Mr. Pan and used the threat of arrest for a crime that it had manufactured to coerce him to help the Government manufacture a crime by Mr. Liu.

The Government's terrorization of Mr. Pan on October 20, 2011 has been described in detail above. This was an outrageous abuse of the power and authority by the federal agents and this conduct is itself shocking to the conscience and outrageous. The agents' references to Mr. Pan's wife and children went well beyond permissible threats of arrest or prosecution.

The Government promised Mr. Pan it would not arrest him if he was truthful and cooperated with the agents in their attempt to manufacture a criminal case against John Liu and his campaign staff. The FBI agents did not say that their promise was in any way contingent upon whether Mr. Pan's cooperation resulted in their successfully manufacturing a criminal case

against John Liu. The agents did not say that Mr. Pan would receive immunity from prosecution or that his cooperation would be made known to a sentencing court in order to possibly reduce his sentence.

A promise to not even arrest is highly unusual. The Government was so desperate to manufacture a criminal case against Mr. Liu made Mr. Pan an offer it rarely, if ever, makes. The making of this extraordinary offer to Mr. Pan is evidence that the Government manufactured a crime it was prepared not to prosecute in order to use threat of arrest for that crime to coerce Mr. Pan to cooperate in the Government's manufacture of a criminal case against Mr. Liu.

Dissatisfied with Mr. Pan's inability to truthfully implicate Mr. Liu or his campaign staff, the Government completed its descent into unconscionable conduct by breaking its promise and arresting Mr. Pan on November 15, 2011.

CONCLUSION

The Government conduct described herein, whether taken separately or together, constitutes conduct shocking to the conscience and outrageous behavior requiring a dismissal of the Superseding Indictment against Mr. Pan.

If these factual allegations are disputed by the Government, we respectfully submit that what is required and necessary to determine the validity of these serious allegations is a pre-trial hearing.

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Respectfully submitted,

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